UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

CL FRANK MANAGEMENT, LLC, CL METROPOLIS MANAGEMENT, LLC, AND CL VERTIGO MANAGEMENT, LLC, A SINGLE EMPLOYER D/B/A HOTEL PROJECT GROUP D/B/A HOTEL FRANK, **and** **CL FRANK MANAGEMENT, LLC, CL METROPOLIS MANAGEMENT, LLC, AND CL VERTIGO MANAGEMENT, LLC, A SINGLE EMPLOYER D/B/A HOTEL PROJECT GROUP D/B/A HOTEL METROPOLIS** **and** **UNITE HERE! Local 2**	Case Nos. 20-CA-35123 20-CA-25223 20-CA-35238 20-CA-35253 (Consolidated)

EMPLOYER'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

John A. Ontiveros, Esq.
Keahn Morris, Esq.
JACKSON LEWIS, LLP
655 West Broadway, Suite 900
San Diego, CA 92101

ATTORNEYS FOR EMPLOYER CL FRANK MANAGEMENT, LLC

Thomas H. Petrides, Esq.
K&L GATES, LLP
10100 Santa Monica Boulevard, 7th Floor
Los Angeles, California 90067

ATTORNEY FOR EMPLOYER CL METROPOLIS MANAGEMENT, LLC

Dated: August 26, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

I. INTRODUCTION

CL Frank Management, LLC d/b/a Hotel Frank, LLC and CL Metropolis Management LLC d/b/a Hotel Metropolis, LLC (collectively "Employer" or "Hotel") submit this Brief in Support of its Exceptions to the Administrative Law Judge's Decision ("Decision"), which Administrative Law Judge William L. Schmidt ("ALJ") issued on July 6, 2011. In his Decision, the ALJ concluded the Hotel's verbal and written discipline, and later discharge, of Charging Party Marc Norton was a violation of Section 8(a)(3) the National Labor Relations Act ("NLRA" or "Act"). (D. 26:19-30:30, 32:20-23)[1] He also found the Employer unlawfully disciplined six employees because of their protected, concerted activities (D. 8:10-47, 32:10-14) In addition, he determined the Hotel requested employees remove union insignia and engaged in surveillance of union activity in violation of Section 8(a)(1) of the Act. (D. 12:8-13:12, 18:46-19:18, 32:11-14) Finally, the ALJ found the Employer unilaterally extended employees' probationary period in violation of Section 8(a) (5) of the NLRA. (D. 9:49-10:46, 32:25-28) The Hotel hereby excepts to these parts of the ALJ's Decision, including his respective Conclusions of Law, Remedy, and Order, and requests that the National Labor Relations Board ("NLRB" or "Board") overturn and vacate this portion of ALJ's Decision.

The ALJ incorrectly found the Hotel disciplined and discharged Norton because of his union and/or protected, concerted activities. The uncontroverted evidence during the hearing clearly demonstrated that the Employer disciplined Norton and ultimately refused to offer him full-time employment because of his sub-standard guest service. The record evidence is full of

[1] "(D. __)" references the Report by page and line number, "(Tr. __)" references cites to the official hearing transcript page, "(R. Ex. __)" refers to Employer exhibits submitted during the hearing, ("Bd. Ex. __) refers to the Board Exhibits submitted during the hearing, and "(U. Ex. __)" refers to Union exhibits submitted during the hearing.

evidence that Norton believed that he did not have to meet this requirement. The ALJ failed to give this evidence adequate weight, including the mystery shopper reports, which repeatedly noted Norton's insufficient work habits.

The ALJ also incorrectly determined the Employer violated the Act when it issued a memorandum to several housekeepers for failing to clean their required 15 rooms. The Hotel provided the ALJ undisputed evidence that its job standards required housekeepers clean 15 rooms per shift and the aforementioned employees did so by intentionally slowing down their work. Thus, the employee's acts were unprotected and warranted disciplinary action.

In addition, the Hotel's photographs of the Union's demonstration in the facility—which prevented the Hotel's guests from entering and leaving the building—on September 8, 2010[2] constituted lawful documentation of a trespass.

The ALJ also incorrectly determined that the Employer unlawfully extended the employee's probationary period. Established Board law allows a company to set initial terms and conditions of employment and to exercise discretion in asserting those rules, such as in the present case. Moreover, the alleged unilateral change had a *de minimis* effect on bargaining unit employees' employment.

Finally, the ALJ incorrectly determined the Hotel unlawfully told employees to remove their Union insignia button because, in reality, the Employer's actions were not coercive.

Accordingly, the NLRB should overrule the ALJ's Decision as described herein.

[2] All dates hereafter occurred in 2010 unless otherwise stated.

II. FACTUAL BACKGROUND AND ARGUMENTS IN SUPPORT OF EXCEPTIONS

A. General Background

1. Employer Sets Initial Terms and Conditions of Employment

The Employer provides hotel services in San Francisco, CA. (D. 3:45). Until May 12, 2010, Joie de Vivre owned and operated Employer and CL Vertigo Management, LLC d/b/a Hotel Vertigo. (Tr. 39) UNITE HERE! Local 2 ("Union") represented Employer's room cleaners, bellmen, front desk clerks, and laundry employees. (D. 3:45-4:7) Hotel Vertigo is a non-union facility. (D. 4:6-7)

On May 12, CRESS Hotel Portfolio, Inc. ("CRESS") acquired Employer and the Vertigo pursuant to a bankruptcy sale. (D. 4:18-21) Immediately thereafter, CRESS created the Hotel Project Group ("HPG"), which managed and operated the three hotels. (D. 4:21-23)

Bashar Wali is the President of HPG and is responsible for overseeing the Hotel. (Tr. 451) Maribel Olmeda is HPG's Director of Human Resources and provides Employer with administrative services. (Tr. 552-553, 612) Stan Kott serves as the Employer's General Manager, and is responsible for overseeing the Hotel's day-to-day activities. (Tr. 791) Michael Infusino is the Hotel Frank's Front Office Manager and supervises the front desk clerks and bellmen. (Tr. 690)

On the day of the bankruptcy sale, the Employer met with the Hotel's employees. (D. 4:25-26) The Employer told them HPG was not assuming the prior collective bargaining agreement ("CBA") and would be setting new employment terms. (D. 4:25-5:11) Employer's managers then issued employees several documents, including an offer letter, job performance standards, and an Employee Handbook. (D. 4:25-5:11) The Employer's handbook contains an introductory period and employment at-will policy. (D. 4:25-5:11; Tr. 454-456; R Exh. 2, 5) The

Hotel then gave employees 72 hours to review the documents and accept the job. (D. 5:17-22; Tr. 754)

On May 25, Wali met with Mike Casey, Union President. (D. 5:37-38) He informed Casey HPG was managing the Employer and would not assume the prior CBA. (D. 5:37-45) However, Wali clarified he would be willing to negotiate a new contract should the Union demand recognition. (Tr. 475-476)

Wali sent a letter to Casey on June 8 stating he had not yet received the Union's request for recognition. (D. 5:47-6:8; Tr. 477-479; R Exh. 12) Casey responded by letter stating the Union wished to be recognized, which the Employer did not receive until the evening of June 10. (D. 5:47-6:8; Tr. 481-482; R Exh. 13) Wali sent a letter to Casey on June 14 proposing negotiation dates. (D. 5:47-6:8; Tr. 483-484; R Exh. 14)

On June 10, Wali met with Casey and approximately 12 unit employees. (D. 6:10-11) Casey requested employees be permitted to wear union buttons; Wali agreed. (Tr. 480-482, 484; R Exh. 14) The following day, nearly all bargaining unit employees were wearing union insignia. (Tr. 318, 481-482, 484; R Exh. 14)

2. Employer Begins Negotiations with the Union

Wali and Casey began negotiations for a new agreement on July 1. (D. 6:11-12) There were approximately nine bargaining unit members present. (Tr. 335) They exchanged proposals and discussed them. (Tr. 488-489)

Wali and Casey communicated again on July 3. (Tr. 484-486) They discussed their proposals but did not come to an agreement. (Tr. 489-490) Wali proposed an interim resolution of maintaining the status quo—including reducing the housekeepers' room cleaning quota from 15 to 14—but Casey rejected it and refused to negotiate further. (Tr. 489-490; R Exh. 15)

On July 14 and 28, Wali sent letters to Casey re-proposing his interim resolution and requesting further bargaining dates. (Tr. 491, 516-517; R Exhs. 15, 16) Casey, however, did not respond. (Tr. 516-517)

3. Employer Extends Introductory Period per the Policy in Its Handbook

The Hotel utilized Mystery Shopper Reports to evaluate its employees' guest service. (D. 5:24-35) An independent third-party company, D.C. Buesser & Associates, conducted the evaluation and prepared the reports. (D. 5:24-35) It hired mystery shoppers to conduct the evaluations. (D. 5:24-35)

In late July, Kott had multiple telephone conversations with Wali and Olmeda about concerns he had regarding the performance of "front-of-the-house" staff—i.e., front desk and bellmen—at all three hotels. (Tr. 526-527, 623-624, 829) He explained that, based on his own evaluation and the Mystery Shopper Reports, the front-of-the-house staff—including Marc Norton—were not providing quality guest service. (Tr. 832-833) He suggested Employer extend their introductory period an additional 45-days so he could conduct additional training and request further Mystery Shopper Reports. (Tr. 528-529, 830-834; GC Exh. 14) Wali accepted his recommendation and implemented the extension on August 5. (D. 9:36-38) However, the front-of-the-house staff still received the same benefits as those who were offered employment. (Tr. 877-878)

B. The Employer Disciplined and Ultimately Failed to Offer Norton Full-Time Employment Because of His Poor Work Performance

1. Factual Background

a. Employment History

Marc Norton accepted employment with the Hotel Frank as a bellman on May 12. (D. 19:37-39; GC Exh. 2; R Exh. 2-5) (He also worked as a bellman for the prior owner.)

(D. 19:29-30) He received, reviewed, and signed the offer letter, Employee Handbook, and job performance standards. (D. 19:41-20:6; GC Exh. 2; R Exh. 2- 5, 9, 10)

As a bellman, Norton's job duties included assisting guests with their arrival and departure, providing luggage service, delivering room service, and arranging transportation. (Tr. 37, 699; R Exh. 4, 9, 10) The Hotel expects bellmen to greet guests enthusiastically at all times, obtain and repeat their name, offer to handle their luggage, escort them through the lobby, and introduce them to the front desk. (Tr. 699-700; R Exh. 4, 9, 10) It also expects them to escort guests to their room, offer information about the area, and provide a brief orientation of the room's amenities. (Tr. 699-700, 705-707; R Exh. 4, 9, 10) The Employer also expects all employees, including bellmen, to assist internal guests, i.e. co-workers, as they would an external one. (Tr. 846; GC Exh. 9)

b. June 19 Training Session

In approximately early June, Kott received the Employer's first Mystery Shopper Report. (Tr. 807) He was unhappy with the results. (Tr. 807) He asked Dale Blosser, President and Owner of D.C. Blosser & Associates, to conduct training to address these issues. (D. 20:43-44; R Exh. 23)

Blosser conducted the training for all of the Hotel's employees on June 19. (Tr. 806; R Exh. 23) At one point, he recalled a story regarding another hotel employee who kindly assisted him with his luggage. (Tr. 808-809) Norton, in a loud and aggressive voice, interrupted and said, "Mr. Blosser, you may not know it, but you're walking into a minefield here....Well Mr. Blosser, you may not know it, but we're in the middle of a big union fight here....Mr. Blosser, if you're going to talk about room cleaners carrying bags, then that's something that would be more appropriate to the bargaining table with our union president Mike Casey than at a training

meeting." (D. 20:50-21:22; GC Exh. 7) One bargaining unit employee retorted, "This isn't about the union. This isn't about the union. This is about service." (D. 21:17)

On June 23, Kott and Olmeda met with Norton to discuss his interruption of the training. (D. 21:26-28; GC Exh. 7) Kott explained to Norton that the purpose of the training was to improve customer service, and that his comment was out of context and disruptive. (D. 21:28-30; Tr. 627-628, 811-812; GC Exh. 7) They explained to him he was required to follow the Hotel's standards for quality service. (D. 21:30-34; Tr. 627-628) At no point did Kott or Olmeda tell Norton he would not pass his introductory period if he did not remain "on the same page" as the Hotel. (Tr. 628-629, 812) Kott memorialized the meeting in a document titled "Record of Conversation." (D. 21:38-45; GC Exh. 7)

c. Norton's Continued Demonstration of Poor Guest Service

During the first 90 days of his employment with the Hotel, Norton provided inconsistent and poor customer service. He failed to use guests' names, acknowledge their presence in the lobby, or open their door. (Tr. 814-817) He often stood with his arms crossed and appeared "unwelcoming." (Tr. 530) Kott, who often observed Norton when he was in the building, described him as inconsistent, unfriendly, and minimalistic. (Tr. 814-815) Wali and Infusino made similar observations. (Tr. 712-714; 530-531) As a result, Employer decided to extend Norton's introductory period along with other front-of-the-house staff. (Tr. 528-529, 830-833)

Kott and Infusino saw improvements in all other employees' performance, except Norton. (Tr. 531, 714, 817) He continued to be inconsistent, unfriendly, and minimalistic. (Tr. 530-531; 712-714; 814-816)

Kott received and reviewed four Mystery Shopper Reports after the introductory period. (Tr. 530-531, 710-746, 814-817; R. Exhs. 18-21) Each report contained descriptions of Norton's

performance that were consistent with Kott's and Infusino's observations. (Tr. 530-531, 710-746, 814-817) The mystery shopper in the August 8th report wrote that Norton was "minimalistic with his performance," failed to obtain or use his name, and "did not attempt to engage" him while he checked in. (Tr. 718-726; R Exh. 18) (Norton later admitted to Kott he was aware this individual was a mystery shopper.) (Tr. 206-207; GC Exh. 19) A different mystery shopper wrote in the August 31st report that Norton also failed to use his name. (Tr. 727-728; R Exh. 19)

The mystery shopper in the September 9th report provided Norton a scathing review. He rated Norton 40% for guest arrival, 30% for room assistance, and 30% for check-out. (Tr. 729-740; R Exh. 20) He noted—among other things—that Norton did not open his car door, provide a warm greeting, orient him to the room, inquire regarding directions, assist with luggage, or at any time ask for his name. (Tr. 729-740; R Exh. 20)

Soon thereafter, Kott received a September 12th report wherein another shopper wrote that Norton did not "sound very interested in going the extra mile," make eye contact, or provide a warm greeting. (Tr. 741-746; R Exh. 21) He further stated that he got the feeling Norton did not "care much one-way or the other" about his job. (Tr. 741-746; R Exh. 21)

d. Norton's Refusal to Assist Co-Workers

Norton also failed to properly serve co-workers. On August 30, Dayna Zeitlin, Employer's Director of Sales and Marketing, arrived by taxi at the Hotel Frank entrance. (D. 22:35-43; GC Exh. 9) Norton came out of the hotel to assist, but after seeing it was Zeitlin, turned around and walked away. (D. 22:41-43) Norton saw that Zeitlin was carrying several bags and was visibly struggling to carry them into the hotel. (Tr. 598-600) Nevertheless, Norton stood in the hotel lobby looking at her and did not help. (D. 22:44-46; Tr. 598-600) Zeitlin reported

the incident to Kott. (D. 23:5-6) Kott then decided to issue disciplinary action to Norton for his failure to assist Zeitlin. (D. 23:6-7) (He previously spoke to all staff members—including Norton—about the importance of assisting co-workers, and treating internal guests as well as external ones.) (Tr. 846; GC Exh. 9)

On August 31, Kott met with Norton to discuss the incident and issued him a written warning. (D. 22:33; GC Exh. 9) Kott explained to him his failure to assist Zeitlin was not conducive to a cooperative working environment. (Tr. 848; GC Exh. 9) Norton did not dispute that he failed to assist Zeitlin into the hotel. (Tr. 848)

e. Employer Did Not Offer Norton Employment at the End of His Introductory Period for Failing to Meet the Hotel's Performance Standards

At the end of the extended introductory period, Wali, Kott, and Olmeda discussed the performance of all front-of-the-house staff. (Tr. 535-536, 867) Kott stated that all of them, except Norton, had either improved or showed a willingness to improve their performance. (Tr. 536-537) Based on Kott's personal observations of Norton's poor work habits, his communications with Infusino, the results of the Mystery Shopper Reports, and Norton's written warning for the Zeitlin incident, Kott recommended that the Hotel not offer Norton full-time employment. (D. 24:40-25:23) Wali accepted his recommendation. (D. 24:40-25:23) On September 30, Kott issued Norton a letter stating the Hotel would not be offering him full-time employment. (D. 24:14-15; GC Exh. 10)

2. Argument

The ALJ determined the Hotel issued Norton an oral warning on June 23, a written notice on August 31, and discharged him on September 30 because of his union and/or protected

concerted activity. (D. 26:19-30:30, 32:20-23) However, he failed to consider the numerous instances of Norton's poor work performance.

a. The Hotel Orally Reminded Norton on June 23 of Its Performance Standards and that He Should Follow Them. It Did Not Discipline Him Because of any Union and/or Protected Concerted Activity.

The ALJ incorrectly determined that the Hotel disciplined Norton because of his union and/or protected activity during the June 19 meeting. Norton's irrelevant outburst during the training was unprotected. Nevertheless, the Employer never disciplined Norton because of the outburst. Kott and Olmeda simply reminded him that he needed to follow the Employer's performance standards.

In order to establish that an employee was disciplined because of their union activities, General Counsel must establish by a preponderance of the evidence that: the employee was engaged in union or other protected activity; the employer had knowledge of such activity; the employer harbored anti-union animus; and the employees' union and/or protected activity was related to the discharge. Wright Line, A Division of Wright Line, Inc., 251 NLRB 1083 (1980), enf'd 662 F.2d 899 (1st Cir. 1981); see also State Plaza, Inc., 347 NLRB 755 (2006) (General Counsel must show "activity was a substantial or motivating reason for the employer's action.") If General Counsel meets this burden, the employer must then establish that the discharge would have taken place even in the absence of the union conduct, which is the case in the present matter. Efficient Medical Transport, 324 NLRB 553, 555 (1997). To establish its affirmative defense, an employer "must only show that it reasonably believed" that the employee engaged in conduct warranting the adverse employment action. Jordan Marsh Stores Corp., 317 NLRB 460 (1995).

The Hotel contests the ALJ's finding that Norton's outburst during the training was protected under the Act. Although his statements may have touched on matters of union activity, they were unrelated to the subject matter. Blosser, the trainer, was simply relaying a story about what he considered to be good customer relations. Norton's retort had absolutely nothing to do with customer service. At least one bargaining unit employee pointed this out to him. (D. 21:17; GC Exh. 7)

Although Norton may have veiled his comments under alleged Section 7 activity, he was in reality disputing that employees had any obligation to provide good service. Indeed, the record evidence is chock full of examples of Norton's refusal to provide such accommodations, such as his poor ratings in the mystery shopper reports, his failure to assist a manager into the building, and Kott's and Infusino's observations of his overall poor attitude.. Thus, his intent was solely to disrupt the trainer's rhythm. The NLRB has long recognized that such behavior may be lawfully disciplined. Carrier Transicold, 331 NLRB 126 FN1 (2000) (Board upheld ALJ's ruling that employer lawfully disciplined employee based on employee's interruption of a meeting.)

Nevertheless, even assuming that Norton's behavior was protected and not disruptive—which is untrue—the Employer did not discipline him because of his union and/or protected activity. First, Kott and Olmeda did not issue Norton an oral warning on June 23. The Hotel issues oral discipline on an Employee Corrective Action Forms, which did not happen here. (Tr. 884-885; GC Exhs. 7, 9, 39) In fact, Norton only received a copy of the Record of Conversation after he requested to review his personnel file weeks later. (Tr. 219-220, 884-885; GC Exh. 7) Kott and Olmeda did nothing more than remind Norton that he was required to provide good customer service. Indeed, they rightly believed Norton did not intend to provide

quality service because he made clear to Blosser that this was something that had to be negotiated before he would do it.

In addition, the ALJ incorrectly credited Norton that during the June 19 meeting, Olmeda warned him that he was still on probation, and they were going to have to make decisions on who to keep based on which employees "are on the same page with us." (D. 21:48-55, FN12) Olmeda and Kott credibly testified that she never sais such a thing. Nonetheless, Olmeda's alleged statement constituted nothing more than her reminder to Norton that he was required to follow the Employer's job standards. The Hotel was rightly concerned that Norton had no intention of following the Employer's required level of customer service because—as he made clear during the June 19 training session—this was a matter that had to be negotiated first.

b. The Employer Issued Norton a Written Warning Because of His Refusal to Assist a Manager Who Was Struggling to Enter the Facility

The ALJ also found the Hotel issued Norton a written notice on August 31 because of his union activity. However, the evidence clearly established the Employer issued him a warning because he intentionally failed to assist a co-worker—more specifically, a manager—carry bags into the Hotel. Prior to the August 30 incident, Kott advised all team members—including Norton—that they were to respect one another, work as team players, and treat internal guests the same as external ones. (Tr. 846; GC Exh. 9) This was particularly important in front of other guests in order to project an environment of good service. Norton's refusal to open the door and offer assistance to a fellow employee—who was visibly struggling—did not meet this standard. (Tr. 846; GC Exh. 9)

Norton's intention to not assist Zeitlin is blatantly clear from the record evidence. The ALJ found that on August 31, Norton walked up to the door when he saw a taxi arrive.

(D. 22:41-43) However, he then credited Norton's account that once he saw Zeitlin, he turned around and left because he did not notice she had luggage. (D. 22:41-43)[3] However, there is no dispute that Norton saw Zeitlin struggling to enter with two big bags in her arms and he refused to help. (Tr. 598-600) There is also no dispute that, as part of his job, Norton was required to assist. (Tr. 598-600) The ALJ, however, failed to acknowledge these points in his Decision.

Instead, the ALJ found the disciplinary action, which stated Norton's behavior reflected an unacceptable "attitude," again demonstrated the Employer's anti-union motivation to discipline, and ultimately discharge, Norton. This is incorrect. Kott disciplined Norton for failing to assist a manager get into the building and nothing more. Kott was frustrated with Norton's continued lack of customer service skills and decided to take action.

c. The Hotel Did Not Offer Employment Following the End of the Introductory Period Because of His Poor Work Performance

The ALJ also found that the Employer discharged Norton because of his Union activities. However, the Employer takes exception to his finding. The Employer did not offer him full-time employment because he consistently failed to meet its job standards for a bellman. This decision was based on the Mystery Shopper Reports, management's personal observations of Norton's performance, and the August 31 written notice. (Tr. 443, 535-536, 546, 867-868; GC 10)

The evidence was undisputed that Norton's performance was sub-standard. Wali, Kott, and Infusino testified, without contradiction, that Norton's guest service was inconsistent, unfriendly, and minimalistic. (Tr. 814-816) Moreover, the evidence demonstrated that Norton failed to warmly greet guests by refusing to use their names, acknowledge their presence in the lobby, or open their door. (Tr. 530, 814-817) During the extended introductory period, four

[3] The ALJ did not credit Zeitlin's version of events. However, Zeitlin was well composed under both direct and cross-examination, and her testimony was consistent throughout. Accordingly, Zeitlin's should be credited over Norton's version of the events leading to the written warning.

mystery shoppers—all of who were neutral third-parties, and one of whom Norton was aware was a mystery shopper—noted numerous deficiencies in his guest service. (Tr. 206-207, 718-746; R Exh. 18-21) Indeed, his lack of enthusiasm in providing quality service was demonstrated by his refusal to assist a senior manager who was struggling to get into the hotel. (Tr. 601, 845-846, 848; GC Exh. 9) Based on this information, Kott reasonably concluded that Norton should not be offered full-time employment. Although the ALJ took issue with the Hotel informing Norton after his probation, the Employer made the decision well before then. (Tr. 535-536, 867)

Moreover, the ALJ failed to give proper weight to the mystery shopper reports. (D. 30:17-23) Although a few of the reports made positive comments regarding Norton, the overwhelmingly described him as having performing deficiencies in several areas. (R Exh. 18-21) Moreover, the ALJ failed to acknowledge that while other employees at all three hotels had improved in the mystery shopper reports, Norton was the only who did not.

In addition, the ALJ's finding that Norton was discharged because of his protected activities is disputed by the evidence. When Norton raised such issues—such as the alleged California Labor Code violation and commuter benefits issues—the Hotel thanked him and made the requested changes. (Tr. 196-202, 632-634, 869-872; GC Exh. 5, 17-24, 25, 30)

Moreover, as discussed earlier, the ALJ mischaracterized his finding that Olmeda's statement that Norton needed to get on the "same page" as the Hotel constituted a threat to fire him because of his union activities.[4] As described herein, she was simply reminding Norton of the Employer's requirement that he needed to perform according to the Hotel's required level of service for bellman or he would not pass his probationary period.

[4] The Employer, however, still refutes that Olmeda ever made such a statement.

C. The Hotel Disciplined Its Housekeepers Because They Failed to Clean Their Required 15 Rooms and Not Because of any Alleged Protected, Concerted Activity

1. Factual Background

Under the prior employer, housekeepers were required to clean 14[5] rooms in seven hours of scheduled work.[6] (Tr. 471-472) The Hotel changed this condition and required housekeepers to clean 15 rooms in seven and one half hours of scheduled work. (D. 7:6; R Exh. 3) It did so by changing hourly employees' shifts to eight and one half hours, with a 30 minute unpaid lunch and two paid 15 minute breaks. (D. 7:6-11; Tr. 471-472; R Exh. 3) Although the total number of rooms increased, the housekeepers had the same amount of time to perform their duties, i.e. one room for every 30 minutes of work.[7] (Tr. 471-472)

On June 28, at approximately 12:00 pm, Union Representatives Raphael Leiva and Josphine Rivera met with employees to organize a "room drop." (D. 7:22-26) Rivera and Leiva instructed the Hotel's housekeepers not to clean more than 13 rooms that day. (D. 7:22-26) Housekeeper Monica Solis testified she had no intention of cleaning more than 13 rooms following this conversation. (Tr. 349, 359)

At approximately 4:15 pm that day, (15 minutes before the end of the housekeeping shift) Rivera went to the Hotel Frank and went up to the rooms where the Housekeepers were working. (Tr. 406) Rivera, accompanied by housekeepers, Souping Huynh, Dinora Medrano, Monica

[5] The ALJ found that the prior CBA provided that employees were required to clean 13 rooms per day. (D. 7:5) However, the undisputed evidence found that the requirement was, in fact, 14 rooms per day. (Tr. 471-472.)
[6] The shift duration was eight hours, with a 30 minute paid lunch and two paid 15 minute breaks. (Tr. 471-472)
[7] Both the predecessor and the Hotel provided an exception if housekeepers were assigned a certain number of check-outs. Under the predecessor, if a housekeeper was assigned 8 or more check-outs, the number of rooms dropped by 1 room. (Tr. 473) Under the new terms implemented by the Hotel, if a housekeeper was assigned 11 or more check-outs, the number of rooms dropped by 1 room. (Tr. 473) By providing an additional 30 minutes of scheduled work, the Hotel believed this was more than enough time to complete the required number of rooms. (Tr. 473)

Solis, and Amy Lum, went into the office of Melanie Martinez, Director of Housekeeping, and told her the housekeepers could not finish their rooms. (Tr. 406-407, 663-664)

Around that same time, two housekeepers approached Hotel Manager, Kristopher Mangonon and told him that they were not going to be able to finish their room assignments for the day. (D. 7:30-37) The housekeepers never complained they had been unable to clean the required number of rooms before or after this incident. (Tr. 580)

Martinez reported what occurred to Kott. (Tr. 620-621, 665-666) On June 29, Kott, Wali, and Olmeda discussed the incident and decided to issue a memorandum to these employees documenting their actions and advising them that it was their responsibility to clean 15 rooms. (Tr. 518-519, 620-622)

2. Argument

The ALJ's contention that the Hotel disciplined the aforementioned employees for engaging in protected activity in violation of Section 8(a)(1) is inaccurate. The employees' actions constituted nothing more than a refusal to perform their duties by slowing down their work. The evidence clearly demonstrated that their goal was to disobey an order to clean their performed rooms, not to further any objective on behalf of their terms and conditions of employment.

The evidence is undisputed that on May 12 the Employer implemented a new rule requiring the housekeepers to clean 15 rooms during their eight hour shift. (Tr. 466-467, 471-473; R Exh. 3) The evidence is also undisputed that the aforementioned housekeepers refused to clean all 15 rooms and provided no excuse for doing so. (Tr. 349, 359, 417-418, 471-473, 528; R. Exh. 3)

The employees' actions did not constitute any type of union activity to further their employment terms. Just four days after the housekeepers refused to clean their required 15 rooms, Wali unconditionally offered the Union a return to the status quo, but Casey refused. (Tr. 489-490; R Exh. 15) The Union's rejection of the offer demonstrated that the cleaning requirement of 15 rooms was of minor concern. Indeed, Union representative Josephine Rivera testified several times on direct and cross-examination that the decision to not clean the rooms' was the employees' decision, not theirs. (Tr. 416-417) On the day of the incident, no employee or union representative made any demand in support of the alleged Section 7 activity. Quite simply, the employees were intentionally violating the Hotel's policies and nothing else.

The evidence further illustrated that the employees were engaged in an unprotected slowdown. See Elk Lumber Co., 91 NLRB 333, 336 (1950) The ALJ did not uphold this contention, instead finding that the employees simply ceased cleaning their rooms at ½ hour before their shift ended. (D. 8:27-30) In support of this, the ALJ found that the employees frequently skipped breaks to finish cleaning their rooms. (D. 8:27-30) However, as described previously, the housekeepers had the same amount of time to perform their duties as they had under the predecessor, i.e. one room for every 30 minutes of work. (Tr. 471-472) Thus, by 4:00pm, the housekeepers were intentionally one room behind schedule. No employee before or after this incident ever complained that they could not complete the required 15 rooms. (Tr. 580) Indeed, the Union representatives and Solis testified that they intended to only clean 13 rooms that day. (Tr. 349, 359, 416-417) The housekeepers did not walk off the job; they simply slowed down their production. Such actions are simply not protected.

D. The Employer Did Not Unilaterally Implement a New Term and Condition of Employment When it Extended the Introductory Period Because the Hotel Lawfully Began the Policy on May 12. In addition, the Extension Did Not Materially Affect Employees' Terms and Conditions of Employment

1. Factual Background

On May 12, the Hotel implemented its handbook, which states that new employees are subject to a 90-day introductory period. (Tr. 454-456; R Exh. 2, 5) The handbook also states Hotel management may extend the introductory period, if necessary.

During the introductory period, Kott evaluated employees' performance at all three hotels and determined that the front-of-the-house staff needed further evaluation. (Tr. 528-529, 830-831) Accordingly, he recommended to Wali and Olmeda they extend the introductory period for an additional 45-days in order to provide further training and conduct more Mystery Shopper Reports. (Tr. 529, 624, 834) Although Wali accepted the recommendation, he provided the extended employees the same benefits as those who were not. (Tr. 877-878)

2. Argument

The Hotel was under no duty to bargain with the Union regarding its 45-day extension of the introductory period. Employer lawfully implemented the policy on May 12 in its handbook. (Tr. 454-456; R Exh. 2, 5; GC Exh. 2) See NLRB v. Burns Security Services, 406 U.S. 272, 294-295 (1972). Although the policy permitting the Hotel to extend its introductory period contained some limited discretion, the NLRB permits such leeway in an employer's initial terms and conditions of employment. See Monterey Newspapers, Inc., 334 NLRB 1019, 1020-1021 (2001) (Successor employer lawfully established as part of its initial terms a separate pay system that contained some discretion.)

Notwithstanding the ALJ's finding, the Hotel's discretion to extend the introductory period for new hires was tightly circumscribed. The Employer extended the introductory period

for just 45-days. (Tr. 529, 834; GC Exh. 14) There is no evidence the Employer changed or varied this period.

Moreover, the alleged change did not materially affect employees' terms and conditions of employment. The imposed change must be "material, substantial, and significant" to constitute an unlawful unilateral change in violation of Section 8(a)(5) of the Act. See Fresno Bee, 339 NLRB 1214, 1216 (2003). In this case, the Hotel provided unrebutted evidence that the extended employees maintained the exact same rates of pay, benefits, job duties, and performance standards as those who were offered full time employment. (Tr. 877-878) Therefore, the alleged unilateral change had no material, substantial, and significant effect on employees' terms and conditions of employment.

The ALJ disagreed that the change was *de minimis* because "the very nature of a probationary period implies a conditional employment status." (D. 10:15-18) However, notwithstanding the probationary period, all of the employees were subject to at-will employment. (Tr. 454-456; R. Exh. 5, p. 6) Moreover, the employees on the extended probationary period received the same benefits as those who were not on it.

E. The Employer Did Not Violate Section 8(a)(1) When it Took Pictures of the Union's Demonstration in the Hotel on September 8 Because it Was Engaged in the Documentation of Unlawful Trespass

1. Factual Background

On September 8, Norton and a large group of union supporters (approximately 10-20) entered the Hotel Frank's lobby. (D. 18:22-24) The Hotel did not invite the group onto the property. (Tr. 419) Infusino approached the individuals. (Tr. 672-673, 752) The group blocked the path of guests attempting to pass. (Tr. 673) At one point, Martinez approached the group. (Tr. 419)

Norton began taking pictures of Infusino. (Tr. 673) Martinez then used her cell phone to take pictures of the group. (Tr. 67, 147, 673) Thereafter, another member of the group took pictures of Martinez. (Tr. 412)

2. Argument

The ALJ's finding that the Employer had no justification for photographing this exchange is incorrect. The Hotel was documenting the unauthorized presence of the large group, who were obstructing the lobby and blocking guests' ability to traverse in and out of the hotel. See Berrton Kirshner, Inc., 209 NLRB 1081 (1974), enfd, 523 F.2d 1046 (No unlawful surveillance where employer was documenting trespass by union organizers during hand billing.) The Employer did not invite them on the premises. They were not checking in, waiting in the lobby for a guest, or using the lobby for anything the Hotel normally permitted. The fact that Infusino did not immediately protest their presence is immaterial. The Hotel is for guest use only. Any other activity is impliedly an uninvited use of the property. It is equally insignificant, that the group was "peaceful, orderly, and respectful."[8] (D. 19:15) The Employer is unaware that such conduct converts an unlawful trespasser to a lawful one.

F. The Employer's June 4 Memorandum Regarding Union Insignia Did Not Violate Section 8(a)(1) of the Act Because It Had No Coercive Effect On Employees

1. Factual Background

Under the predecessor's CBA, employees were permitted to wear buttons as part of its dress code. (D. 11:8-9) The Hotel implemented a new dress policy that did not state that employees could wear union buttons. (D. 11:9-11; R Exh. 5)

On June 4, a memorandum was posted in the front office indicating that "nametags were the only approved pin or accessory" allowed to be worn on employee uniforms under the

[8] The Employer excepts to the AJL's description of the event.

employee handbook dress code policy. (Tr. 480; GC Exh. 16) The memorandum did not reference Union insignia. (GC Exh. 16) Nevertheless, employees continued to wear their union buttons. (Tr. 51, 53, 54, 318) Indeed, Union President Casey responded to the memorandum with an expletive and instructed employees to continue wearing them. (D. 11:42-44)

On June 10, the Hotel met with the Union and several bargaining unit employees. (Tr. 484; R Exh. 14) Casey mentioned the June 4 memorandum to Wali and requested employees be permitted to wear Union insignia; Wali agreed.[9] (Tr. 480-482, 484; R Exh. 14) The next day, nearly all bargaining unit employees were wearing Union buttons. (Tr. 51, 53, 54, 318)

2. Argument

The ALJ's contention that the Hotel's June 4 memorandum constituted a violation of the NLRA is inaccurate because the Employer's actions were not coercive. The record evidence demonstrates that employees did not reasonably believe the Hotel prohibited the wearing of union insignia as most of them continued to wear their union buttons. In fact, the memorandum does not directly state employees can not wear union buttons. In addition, the Union's president specifically told employees to ignore the memo. Finally, Wali clarified during the June 10 negotiations that employees were permitted to wear union buttons.

[9] The ALJ discredited Wali on this point. However, Wali was a credible witness. The employees' wearing of Union of insignia the next day corroborates his testimony.

III. CONCLUSION

Based upon the foregoing, the Employer requests the ALJ's Decision, including his Conclusions of Law, Remedy, and Order, regarding the foregoing matters be overruled.

Respectfully submitted this 26h day of August, 2011.

JACKSON LEWIS LLP

BY: _____

John A. Ontiveros, Esq.
Khean Morris, Esq.
JACKSON LEWIS LLP
Attorneys for Employer

4845-4209-1274, v. 1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

CL FRANK MANAGEMENT, LLC d/b/a HOTEL FRANK, and CL METROPOLIS MANAGEMENT, LLC, d/b/a HOTEL METROPOLIS **and** **UNITE HERE! Local 2**	Case Nos. 20-CA-35123 20-CA-35223 20-CA-35238 20-CA-35253 (Consolidated)

PROOF OF SERVICE

Case Names: Providence/Hotel Project Group d/b/a Frank Hotel
Provenance d/b/a Hotel Frank
Provenance d/b/a Hotel Frank
Provenance d/b/a Hotel Metropolis

Case Nos.: 20-CA-35123
20-CA-35238
20-CA-35253
20-CA-35223

I, Jamie Fensterstock, declare that I am employed with the law firm of Jackson Lewis LLP, whose address is 1655 West Broadway, 9th Floor, San Diego, California 92101; I am over the age of eighteen (18) years and am not a party to this action.

On August 26, 2011, I served the attached *Employer's Brief in Support of its Exceptions to the Administrative Law Judge's Decision* in this action as follows:

Kim Charles Wirshing
Unite Here Local 2
209 Golden Gate Ave
San Francisco, CA 94102
Phone: (415) 864-8770 x727
Fax: (415) 864-4158
kimwirsh@aol.com

Richard G. McCracken, General Counsel
UNITE HERE International Union
275 7th Avenue
New York, NY 10001-6708
Phone: (415) 597-7200
Fax: (415) 597-7201
rmccracken@dcbsf.com

Kathleen C. Schneider
Counsel for the General Counsel
Region 20, NLRB
901 Market Street – Suite 400
San Francisco, CA 94103-1735
Phone (415) 356-5130
Fax: (415) 356-5156
Kathleen.Schneider@nlrb.gov

Joseph F. Frankl
Regional Director
Region 20, NLRB
901 Market Street – Suite 400
San Francisco, CA 94103-1735
Phone (415) 356-5130
Fax: (415) 356-5156
NLRBRegion20@nlrb.gov

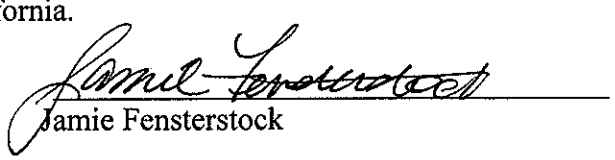
Sarah McBride
Board Agent
National Labor Relations Board, Region 20
901 Market Street – Suite 400
San Francisco, CA 94103-1735
Facsimile: (415) 356-5156
Sarah.McBride@nlrb.gov

Thomas H. Petrides
K&L Gates LLP
10100 Santa Monica Boulevard,
7th Floor
Los Angeles, California 90067
310-552-5077 (direct dial)
310-552-5001 (fax)
thomas.petrides@klgates.com

[X] BY ELECTRONIC MAIL (EMAIL): I attached a full, virus-free pdf version of the document to electronic correspondence (e-mail) and transmitted the document from my own e-mail address, fensterj@jacksonlewis.com, to the persons at the e-mail addresses above. There was no report of any error or delay in the transmission of the e-mail.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 26, 2011 at San Diego, California.



Jamie Fensterstock

4842-8715-6746, v. 1